Article

Recent Development of Arbitration Law in Brazil

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Abstract: Arbitration in Brazil has undergone a remarkable transformation, graduating from a tentative start to a robust and thriving practice. Like many jurisdictions with complex judicial systems, Brazil has found in commercial arbitration a valuable tool to foster economic growth and provide efficient dispute resolution for both domestic and international parties. Initially, when the Arbitration Act was enacted in 1996, it was met with skepticism. Many Brazilian scholars and legal practitioners questioned its constitutionality, as the concept of removing cases from the traditional judiciary's purview seemed far-fetched. The turning point came when Brazil's Supreme Court upheld the constitutionality of the Arbitration Act, providing a significant boost to its adoption and legitimacy. Since then, the country has witnessed rapid advancements in arbitration practices, making it an increasingly attractive venue for resolving commercial disputes. This development reflects a growing confidence among businesses and legal experts in the efficiency and effectiveness of arbitration as a complementary mechanism to the traditional court system. This article aims to delve into the evolving legal environment surrounding arbitration in Brazil. It will explore the dynamic trends that have emerged, such as the increasing sophistication of arbitration procedures, the establishment of dedicated arbitration centers, and the rising number of professionals specializing in this field. Additionally, the article will analyze how these developments have influenced Brazil's attractiveness as a hub for international arbitration, and the impact this has on the nation's legal and economic landscape. By examining these aspects, the article will provide a comprehensive overview of the current state and future potential of arbitration in Brazil.

Keywords: Arbitration law; Brazil law; recent trends; international law

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1. Introduction

Internationally, arbitration is widely regarded as the preferred method of dispute resolution for the most relevant market players[1]. In Brazil, domestic commercial arbitration enjoys immense prestige and popularity[2], being particularly relevant for resolving disputes involving substantial amounts[3]. The same is true for international arbitration in Brazil, since São Paulo is one of the top three preferred seats of international arbitration in the Caribbean/Latin American region[4].

In 2015 Brazil's Legislative approved an update[5] on the Brazilian Arbitration Act (Law 9.307/96). In addition to that, as of March 18th, 2016 the New Brazilian Code of Civil Procedure (NBCCP)[6] entered into force, and those legislative changes brought about some new instruments. Legislative also approved a Labor Code reform in 2017 that expressly authorizes arbitration in individual employment contracts. Also, in 2021 a new Public Procurement and Administrative Contracts Law was approved, which specifically allows the inclusion of an arbitration agreement in all contracts governed by this law. Therefore, all of those legislative updates reaffirmed the

1 According to the 2021 empirical research conducted by Queen Mary University of London, 90% of respondents indicated that international arbitration is the best method of dispute resolution. Available online: https://www.qmul.ac.uk/arbitration/ (accessed on 31 July 2024).

2 The research conducted by Selma Lemes from 2021 to 2022 in eight arbitration chambers in Brazil indicates that 336 new arbitration proceedings were initiated in 2021, and that in the same year, there was a total of 1116 arbitration proceedings ongoing in these chambers. Lemes, Selma Ferreira. 2023. Arbitration in Numbers. 2021/2022 Research. Conducted in 2023. Available online: https://canalarbitragem.com.br/wp-content/uploads/2023/10/PESQUISA-2023-1010-0000.pdf (accessed on 31 July 2024).

3 The same research conducted by Selma Lemes indicated that in 2022, the 336 incoming arbitrations had a combined case value of more than 39 billion reais. Lemes, Selma Ferreira. 2023. Arbitration in Numbers. 2021/2022 Research. Conducted in 2023. Available online: https://canalarbitragem.com.br/wp-content/uploads/2023/10/PESQUISA-2023-1010-0000.pdf (accessed on 31 July 2024).

4 Queen Mary University of London. 2021 International Arbitration Survey: Adapting arbitration to a changing world. Available online: https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/ (accessed on 31 July 2024).

5 Available online: https://www.plana1to.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/Ll3129.htm (accessed on 31 July 2024).

6 Available online: http://www.planalto.gov.br/ccivi1_03/%20Ato2015-20l8f20l5/Lei/Ll3l05.htm (accessed on 31 July 2024).

importance that Arbitration is playing in Brazil, becoming more and more the preferred method of dispute resolution amongst the elite business community.

2. Historical Considerations

Although it has never been widely used Brazil has known and recognized the existence of arbitration practice since it's colonial times, through the Ordenações Filipinas, a Legal Code enacted by King Phillip II during the Castilian Domain of Portugal in 1603 which evoked arbitration as a valid mean of dispute resolution. Ever since, several legal laws from the Portuguese Empire as well as rules enacted by the Brazilian Colonial Government have allowed the use of arbitral proceedings as means of resolving disputes outside of Court. It is worth mentioning that Brazil, as a Colony, was the result of the Tordesilhas Treaty of 1493, which stemmed from an ad hoc arbitration undertaken by the Pope Alexander VI between Portugal and Spain; and, the famous Alabama Arbitration of 1872 that had the Brazilian Baron D'Itajubá as one of its arbitrators. The first Brazilian Constitution, established in 1824, expressly indicated, in its article 160, the use of arbitration for solving legal conflicts[7]. The Commercial Code of 1850 also depicted arbitration as a means of conflict resolution, and in this case was even mandatory in some specific situations[8]. The Civil Code of 1916 had a specific provision allowing arbitral proceedings as well[9]. The Brazilian Constitution of 1934 attributed competence to the Federal Legislative Institutions to discipline the adoption of commercial arbitration[10].

Even though arbitration has most definitely been an institute encompassed within national legislation and known to Brazilian legal scholars and businessmen alike, for a significantly extended period of time it did not establish itself as a viable and often preferable option in contracts concluded domestically. That is so partially because early in the 20th Century there was little commercial disputes and after and during a military dictatorship there has been a largely disseminated understanding that private intervention was not acceptable in all issues, in which the decision-making power was widely regarded as exclusive of state courts or vested solely within government instrumentalities, and in light of the discredit of the institute by the legislation in force, which demanded an extremely rigid, burdensome and complex procedure for the implementation and recognition of both domestic and foreign arbitral awards, there has never been a widespread use of arbitration in any circle, including international contracts. As with most totalitarian states, the institute of Arbitration has been relegated to a less than secondary role. Not only enforcement was hindered by procedural intricacies and a widespread feeling amongst the business entities as well as most people that the Central Government, either directly or through its agencies or instrumentalities and mostly through the Judiciary, were the only entities with actual decision-making powers. It was simply unconceivable that private parties or entities would be vested with any such similar power. Thus, arbitration did not flourish.

In the Brazilian Constitution of 1988, specifically in article 114, §1°, the institute of arbitration appeared for the first time as it is understood and used nowadays. Nevertheless, it was only in 1996, with the enactment of law 9.307 that arbitration became an issue to be discussed both by academic and professional means. Initially, the issue of the new treatment to be given to the institute of arbitration ignited a discussion in what has become Brazil's leading case, SE-5206, before the Federal Supreme Court[11]. The case concerned the recognition and enforcement of a foreign arbitral decision rendered in Spain, by request of a foreign party. The Tribunal analyzed the requisites applicable to the recognition and enforcement of foreign decisions according to Brazilian legislation and also an incidental issue of whether the Brazilian arbitration law was enacted in accordance with the Federal Constitution. The Federal Supreme Court decided that the legislation was not unconstitutional since it did not bar the parties from bringing their disputes to the courts, a fundamental constitutional right. As the Supreme Court affirmed, it merely provided an option to solve their dispute through a private means of resolution if the parties expressly chose to do so. The conflict would only be arbitrable if its object referred to a waivable right with economic interest, thus not interfering with the exclusive competence of the Judiciary, expressed in the constitution, such as certain conflicts like the criminal, labor and family ones, where the public interest were at stake. The decision was given in 2001 and published in the year of 2002.

The ever-growing discussion between legal scholars and jurists culminated in the enactment of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) by the government of Brazil in 2002.[12] This newly enacted legislation has strengthened alternative dispute resolution methods as a whole, granting the confidentiality of the arbitration procedure, as well as creating mandatory mediation in certain cases, regulating the activities of the Mediation and Conciliation Institutions[13].

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7 The Political Constitution of the Empire of 1824 - Art. 160 In Civil or Criminal [Claims] the parties may appoint Arbitrator Judges. Their awards will be enforceable without appeals, if in that way the Parties agree. (Constituição Política do Império do Brazil de 1824 - Art. 160. Nas civeis, e nas penaes civilmente intentadas, poderão as Partes nomear Juizes Arbitros. Suas Sentenças serão executadas sem recurso, se assim o convencionarem as mesmas Partes).

8 Commercial Code of 1850 - Art. 245 - All matters resulting form commercial lease will be decided via arbitration (Código Comercial de 1850 - Art. 245 Todas as questões que resultarem de contratos de locação mercantil serão decididas em juízo arbitral) .

9 Civil Code of 1916 - Art. 1,307 - All persons legally able to contract may use. with the existence of a written commitment, at any time, arbitrators to resolve any and all unresolved issues, be it judicial or extrajudicial. (Código Civil de 1916 - Art. 1.307 As pessoas capazes de contratar poderão, em qualquer tempo, louvar-se, mediante compromisso escrito, em árbitros, que lhes resolvam as pendências judiciais ou extrajudiciais).

10 The Constitution of 1934 determined in its Art. 5, XIX, (c) that it is the exclusive competence of the Federal Union to legislate of Commercial Arbitration matters.

11 Federal Supreme Court, Plenary Session. Challenged foreign judgment ("SE") n. 5206, j. 12.12.2001.

12 Decree 4.311/2002.

13 Article 1, §3 of the NCCP expressly states that conciliation, mediation and other methods of solving disputes must be stimulated by judges, lawyers, public defenders and members of the prosecutor's office, including during the course a judicial process:

According to the UNICTRAL Model Law on International Arbitration[14], drafted in 1985, an international commercial arbitration can be defined as one where (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. The above criteria are widely accepted internationally, but it is imperative to affirm that the Brazilian Arbitration Law, although somewhat based on the UNCITRAL Model Law did not create different rules for domestic and international arbitration; it established different procedures for implementation of arbitral awards obtained within and outside of the country. The Brazilian legal criterion is to determine the internationality of the award, and not of the proceedings, and is only geographic. An award obtained outside of the Brazilian territory is considered foreign, notwithstanding the nationality or domicile of the parties, the place of execution of the contract or the terms of reference, the place of performance, the applicable law, the language, the nature of the contract in which the conflict is based or even the currency of obligation.

3. Contemporary setting and definitions

Article 1 of the Brazilian Arbitration Act determines that persons who are capable of contracting can resort to arbitration to resolve conflicts related to "waivable economic rights". By using the aforementioned terminology, the legislator reserved all issues concerned with rights of a different nature to the jurisdiction of state courts, especially the rights whose holding, by virtue of the non-waivability of such rights, rests exclusively the State. There is also an avid legal discussion concerning the legal nature of arbitration, whether contractual or jurisdictional[15]. The predominant[16] understanding in Brazil is that, according to Scmitthoff's doctrine, it interprets the institute of arbitration as one with a mixed legal nature, in light of its private and contractual root but also its procedural nature according to the law. Procedural rules corresponding to a judicial procedure emerge as result of a private contract. The arbitrator, a private authority, by a legal fiction, becomes a judge in fact and in law[17].

Arbitration brings innumerous advantages to the solution of disputes, comparable to state courts, especially under the principle of party autonomy authorizing the parties to tailor the procedure to their needs, with a lot more flexibility and structure to cater for the needs of the user. In many instances it may grant so because of the procedural efficiency, specialization of the arbitrators in the issue brought to their review, usage of different languages, knowledge of different laws, comparative lower costs, and also the possibility of confidentiality over the matter at hand.

Party autonomy for contracts without arbitration clauses, in Brazil, is widely controversial and to some it is simply inexistent. This is particularly important in Brazil as many scholars understand that given the cogent, mandatory nature of article 9[18] of Brazil's Introductory Law on Applicability of Norms (LINDB), the *lex voluntatis* is not accepted and for contracts executed in a given country, it shall mandatorily be governed by its domestic laws. By contrast, the laws of the country of domicile of the proponent shall govern agreements executed by parties domiciled in different jurisdictions[19]. If the parties have opted for arbitration, there is a longstanding tradition that the parties could elect whichever law they saw fit[20]. This tradition was endorsed in Article 2 of the Brazilian Arbitration Act[21], which also allows the parties the choice to resolve their conflict according to equity, general principles of law, usages and practices or rules of international commerce. It is important for the parties to make that choice before a conflict arises, but it can also be decided when entering into the submission agreement. However, one such decision is unlikely to happen once the conflict has surfaced, because it is unlikely that all parties involved will be in agreement, as they must. In case of silence, it is up to the arbitrators to decide the applicable law. Another advantage is that given the lethargy of a juridical court system

A brand-new section dedicated for conciliation and mediation was added to the NBCCP, Section V, Chapter III, Articles 165 and sequent. Amongst its provisions is the creation of conciliation and mediation centers, as well of a national chart where they shall be registered.

14 It is worth mentioning that Brazil has not enacted the Model Law, and domestic law makes no distinction between domestic and international arbitration.

15 The NCPC in its article 3 acknowledges arbitration as a jurisdictional matter. In its article 42, it sets forth that "civil claims will be administered and decided by the jurisdictional agency within the limits of its competence, being the parties allowed to initiate arbitration, as prescribed in the law."

16 Fredie Didier Jr. is of the opinion that Arbitration is predominantly jurisdictional, and the affirmation is even more important after the enactment of art. 3 of the NBCCP. (in *Revista do Tribunal Superior do Trabalh* 2013, 79:73)

17 Interestingly enough, article 18 of Brazil's Arbitration Law expressly determine that while vested into its mission the Arbitrator is a Judge by fiction of law.

18 "Art. 9º - Para qualificar e reger as obrigações, aplicar-se-á a lei do país em que se constituírem. §1° Destinando-se a obrigação a ser executada no Brasil e dependendo de forma essencial, será esta observada, admitidas as peculiaridades da lei estrangeira quanto aos requisitos extrínsecos do ato. §2° - A obrigação resultante do contrato reputa-se constituída no lugar em que residir o proponente". Free translation: "Art. 9 - In order to characterize and govern the obligations, the law of the State in which they are constituted shall apply. §1 - if an obligation that ought to be performed in Brazil has. & prescribed form, this should be observed, although the peculiarities of a foreign law regarding the extrinsic requirements of the juridical act are allowed.

19 Art. 9, §2 - The obligation resultant of a contract is constituted in the place of the offeror residence.

20 To that effect, see Resp 712566/RJ of 18/08/2005: in international contracts the general principles of international law shall prevail in detriment to the specific governing laws of each country which authorizes the review of the arbitration clause under the terms of the Geneva Protocol of 1923.

21 Brazilian Arbitration Act. Article 2 - At the parties' discretion, arbitration may be in law or in equity, § 1 - The parties may freely choose the rules of law applicable in the arbitration, as long as their choice does not violate good morals and public policy. §2 - The parties may also stipulate that the arbitration shall be conducted under general principles of law, customs, usages and the rules of international trade.

overwhelmed by millions of cases, in which quite often cases take over 10 years to be decided, in arbitration a case can be solved in nearly 19,87 months, in the average[22]. Nevertheless, it is important to consider that more complex and multiparty arbitral proceedings tend to take a much longer time to be resolved.

Given the immense volume of cases many judges are simply not prepared to properly handle complex litigations and the same happens to many appeal courts. Just a handful of cases start and finish in secrecy and little or no attention are given to particular aspects of the cases by the judges, who in no instance can work in other languages. This is the standard for all cases given the current structure of the domestic judiciary so arbitration is an option to the business community willing to avoid it. As commonly known, arbitration is derived from the express will of the parties through an arbitration agreement which in Brazil can be drafted as both an arbitration clause or a submission agreement.

The Brazilian Arbitration Law, in its article 4, defines an "arbitration clause" as an agreement through which the parties in a contract commit themselves to submit to arbitration, the disputes that may arise out of such contract. It would be a determination in abstracto of the means selected by the parties to resolve any future disputes originated from the contract. The submission agreement, according to article 9 of the Brazilian Arbitration Law, is the agreement through which the parties submit a dispute to arbitration of one or more persons, whether judicial or extrajudicial. In that case, the controversy has already been individualized and the parties concluded the agreement, identifying in concrete terms the elements of the dispute, establishing who will sit as an arbitrator and the procedure and deadlines to be followed. Hence, although the use of arbitration is optional pursuant to the Brazilian Arbitration Law, once the parties adopt arbitration through a contractual clause, the institute becomes mandatory. After a dispute arises, both parties are entitled to request the establishment of an arbitral procedure.

The mandatory nature of the arbitration clause has long been recognized by Brazilian state and superior courts. In 2016, the Superior Court of Justice recognized that the institution of an arbitration agreement instantly leads to two well-defined effects. The first, a positive effect, is the submission of the parties to arbitration to resolve any potential disputes arising from the underlying contractual relationship[23]. The second, a negative effect, is that the Judiciary's authority to adjudicate the conflict of interests is withdrawn, as the parties have reserved this judgment for the arbitrators. Nowadays, the Brazilian Superior Court of Justice strictly maintains this understanding, as it was once again decided in 2024, when the STJ reiterated that the arbitration clause, once agreed upon by the parties, possesses binding force and mandatory nature, conferring upon the chosen arbitral tribunal the competence to resolve disputes related to available proprietary rights, thereby derogating state jurisdiction[24].

In the absence of a pathological or duly elaborated arbitral clause with the indication of an arbitral entity, the Brazilian predominant jurisprudence points to the establishment of an arbitral proceeding[25], effectively dismissing the need for judicial intervention to supplement the flawed or incomplete will of the parties to arbitrate the dispute. In the arbitration clause, the choice of a place where the arbitration is to take place will affect the implementation and recognition procedure of the arbitral award. Brazil has steadily been shown to be an arbitration welcoming jurisdiction, with protection from all instances of the Judiciary[26]. When rendered within the Brazilian territory, the award may be enforced immediately in State Courts, since it is equivalent to a domestic judicial judgment. When rendered outside the national territory, the recognition and implementation will depend on the approval of the Superior Court of Justice that has the exclusive competence to confirm arbitral awards.

Like the UNCITRAL Model Law and the New York Convention, Brazilian Arbitration Law further indicates that an arbitral award can only be denied recognition and enforcement when: (i) the parties in the arbitral agreement are not legally capable of concluding contracts; (ii) the arbitration agreement is not binding according to the law to which the parties have submitted themselves, or absent any indication, in light of the law of the State where the arbitral award was rendered; (iii) lack of notification of selection of an arbitrator or establishment of an arbitral proceeding, or other violation of the principle of due process; (iv) the establishment of the arbitration does not comply with the arbitration agreement; (v) the arbitral award is rendered encompassing matters outside of the scope of the arbitration agreement and it is not possible to separate the exceeding part of the one submitted to arbitration in the agreement; (vi) the arbitral award has not yet become obligatory on the parties, has been nullified or halted by a judicial institution of the country in which it was rendered; (vii) according to Brazilian law, the object of the dispute cannot be decided through arbitration; (viii) the arbitral award violates national public policy.

4.Case Law

In line with those rules, the Brazilian Superior Court of Justice had already denied enforcement to a foreign award that was annulled on the seat of the arbitration. In such case, SEC 5.782/AR[27], the application for confirmation was submitted by EDF International S/A (EDFI), claimant in the arbitration proceedings, against ENDESA International S/A (ENDESA) and YPF S/A (YPF). EDFT's claim in the arbitration was that in December 2001, due to the outbreak of an economic crisis in Argentina, the exchange rate regime between the Argentine Peso and the Dollar was changed due to acts of the Argentinian Central Bank, which led it to initiate the arbitration proceedings claiming the adjustment of the contractual values. The award, which partially granted EDFI's request on October 22, 2007, was later definitively canceled by the Argentinian National Chamber of Commercial Appeals, on December 9, 2010. The Board of Appeal held that the arbitrators decided by equity an arbitration which was supposed to be decided only by application of the Argentinian Law. The arbitrators ignored the fact that the Argentinian Convertibility Law

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[22] Lemes, Selma Ferreira. 2023. Arbitration in Numbers. 2021/2022 Research. Conducted in 2023. Available online: https://canalarbitragem.com.br/wp-content/uploads/2023/10/PESQUISA-2023-1010-0000.pdf (accessed on 24 July 2024).

[23] Superior Court of Justice, 3rd Panel. Special Appeal ("Resp") n. 1.569.422-RJ, rel. Min. Marco Aurélio Bellizze, j. 26.04.2016.

[24] Superior Court of Justice, 3rd Panel. Special Appeal ("Resp") n. 2498900 – SP, rel. Min. Marco Aurélio Bellizze, j. 13.05.2024.

[25] Superior Court of Justice, Special Appeal ("Resp") n.1424456, rel. Min. Mauro Campbell Marques, j. 25.05.20215; Santa Catarina State Court of Justice, 4th Chamber of Commercial Law, Interlocutory appeal ("AI") n. 20140065463, rel. Altamiro de Oliveira, j. 15.07.2014.

[26] CBAR. Arbitration in Brazil, 2012. Available online: https://www.cbar.org.br/PDF/Pesquisa_CBAr-Ipsos-final.pdf (accessed on 24 July 2024).

[27] Superior Court of Justice, Special Court. Contested foreign judgment ("SEC") n. 5.782/AR, rel. Min. Jorge Mussi, j. 02.12.2015.

remained in force during the acts of the Argentine Central Bank. Disregarding the annulment in Argentina, EDFI presented the application for confirmation of the award to the Brazilian Superior Court of Justice ("STJ") on June 7, 2011. However, as in a homologation procedure, as a rule, the Superior Court cannot analyze the merits of a foreign judgment, the Superior Court denied the enforcement of the award in Brazil, considering that the annulment of the award by the competent authority of the country where it was issued prevented its approval. This decision was in line with Article V, 1.e of the New York Convention[28].

Notwithstanding, it is also important to consider that the Brazilian system for integrating foreign decisions into the domestic order is known as "moderate deliberation", since to ascertain an alleged violation of public order, it is often necessary to verify the merits of the issue at hand. The offense to public order is hardly present in the form of the act, but rather in its content. In this sense, it is not within the powers of the national judge to reanalyze the merits of the issue to decide it again, but rather to confirm that the foreign court did not disrupt objective principles of Brazilian law. This includes verifying that the decision does not offend national sovereignty, public order, or good morals (widely known as the basis of the domestic Public Policies). Additionally, the judge must assess whether the foreign court's decision aligns with Brazil's principle-based legal structure. Any violation of these principles cannot be accepted without compromising our legal framework. One example of the application of this system can be seen in the Chevron case[29]. In this case, the Superior Court of Justice delved into the merits of the foreign decision to investigate possible corruption. Upon finding significant evidence of corruption, the Court justified its decision not to recognize the judgment based on the violation of public order, both domestically and internationally. This complex case highlights how the recognition of foreign judgments can require an in-depth analysis of the merits, making the process of moderate deliberation a crucial tool for ensuring the integrity of the Brazilian legal system. Another example of this system in practice can be seen in the Abengoa case[30]. In this case, the Superior Court of Justice also delved into the merits of the foreign arbitral award by considering the arguments presented by the parties to annul the arbitral award at the seat, in the United States. In this sense, the STJ took a position that differed from that of the court at the seat, even though both evaluated the same circumstances. While the seat concluded that the circumstances in question did not compromise the arbitrator's independence and impartiality, deciding that the award should not be annulled, the STJ, on the same factual bases, understood that this could lead to a relationship of dependence between the arbitrators and the parties involved.

This dependence, according to the STJ, would violate public order in Brazil. To reach this conclusion, the justices conducted a thorough investigation of the circumstances presented during the attempt to annul the award at the arbitration seat, as well as meticulously analyzed the particularities of the arbitration itself to examine the merits of these decisions. Thus, based on such analyses, the STJ decided not to recognize the award in Brazil and commenced to redefine the criteria for the independence and impartiality of the arbitrator, which will be further analyzed in this paper.

Having examined the STJ's approach to the acknowledgement and implementation of foreign arbitral awards, we will now turn to recent legislative changes that affect thematic arbitration in Brazil, specifically in the areas of Public Administration, labor, and consumer disputes. The participation of Public Administration as a party in arbitration was already recognized by legal doctrine and case law before the amendment of the Brazilian Arbitration Act in 2015, but with its legal provision, there are no longer any doubts. Thus, it can be observed that in Brazil, arbitral jurisdiction has proven to be capable and efficient for resolving disputes involving Public Administration, as long as the requirements of objective arbitrability are met. It is considered that those requirements were met, when contracts concluded by the Public Administration refer strictly to economical activities, such as public services of industrial nature or economic activities concerning the production or commercialization of goods, with the ability to generate profits and earnings. As the rights and obligations emerging from such activities are alienable, they can be subject to arbitration. On the other hand, the activities that derive from the power intrinsic and exclusive of the public administration have their execution directly linked to the public interest, which involve unwaivable and inalienable rights, thus, those cannot be the subject of an arbitral proceeding[31].

After the approval of the new Public Procurement and Administrative Contracts Law in 2021, which specifically states that an arbitration agreement could be included in all contracts governed by this law, and that the end of an administrative contract could be determined by an arbitral decision, the number of arbitrations that have the Public Administration as a party increased. In 2022, almost 11% of the new arbitrations in the 8 Brazilian most popular chambers had the Direct or Indirect Public Administration as a party[32].

Concerning labor arbitration, at first, the objective arbitrability of certain rights was not accepted by the Brazilian Courts. The Superior Court of Labor decided in case No. RR-192700-74.2007.5.02.0002 that conflicts regarding labor rights cannot be decided through arbitration, even when an employee signed an employment contract containing an arbitration clause[33]. The Tribunal adopted the reasoning that labor rights are non-waivable and irrevocable, since the relationship between an employer and an employee is not an even one, the first having greater bargaining power than the later. Nevertheless, this understanding has shifted after the Labor Code reform in 2017. The current Labor Code authorizes arbitration in individual employment contracts, as long as the employee

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[28] New York Convention: "Article V 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (…) (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".

[29] Superior Court of Justice, Special Court. Contested Foreign Judgment No. 8542/EX, rel. Min Luis Felipe Salomão, j. 29.11.2017.

[30] Superior Court of Justice, Special Court. Contested Foreign Judgment No. 9412/EX, rel. Min. Felix Fischer, j. 19.04.2017.

[31] Superior Court of Justice, Second Panel. Special Appeal ("REsp") n. 612.439-RS 2003/0212460-3, AES Uruguaiana Empreendimentos Ltda VS. CEEE, rel. Min. João Otávio Noronha, j. 25.10.2005.

[32] Lemes, Selma Ferreira. 2023. Arbitration in Numbers. 2021/2022 Research. Conducted in 2023, p. 12. Available online: https://canalarbitragem.com.br/wp-content/uploads/2023/10/PESQUISA-2023-1010-0000.pdf (accessed on 31 July 2024).

[33] Superior Court of Labor, 6th Panel. Request for Reconsideration ("RR") n. 192700-74.2007.5.02.0002, rel. Min. Mauricio Godinho Delgado, j. 19.05.2010.

requested the inclusion of the arbitration clause in the contract or the employee expressly agreed to the arbitration clause. Also, labor arbitration in Brazil is limited to employment contracts in which the employee receives as salary a certain amount of money[34].

Although there are still judicial decisions denying the objective arbitrability of some labor issues, the majority of scholars and judges believe that certain labor rights would be non-waivable, but the analysis of factual issues related to these rights, as well as their financial consequences, could be submitted to arbitration. For instance, the arbitrator could not deny an employee their right to maternity leave, but the arbitrator could decide if the event triggering the maternity leave occurred and determine the amount of compensation for maternity leave the employee potentially did not take[35]. Nowadays, due to this legislative update, labor arbitration is increasing its popularity in Brazil, amounting to 36% of the ongoing cases administrated by the Business Arbitration Chamber of Brazil ("CAMARB") in 2022[36]. The Brazilian Arbitration Act also restricts the use of arbitration in Standard Contracts, also called Adherence Contracts. Paragraph 2 of article 4º of the Brazilian Arbitration Law dictates that in such types of contracts, the arbitration agreement will only be enforced if the adherent requests the establishment of the arbitration or agrees expressly with an establishment in writing, in an annexed document or in bold letters, near the actual clause, providing its signature specifically for the arbitration clause. The Code of Consumer Law also states, in its article 51, VII, that a clause establishing arbitration as a compulsory means of dispute resolution in consumer contracts will be null and void. Hence, the use of arbitration in consumer law is extremely restricted. Chief Justice Nancy Andrighi[37] explains that in consumer contracts there is also an unbalanced relationship between the parties. The consumer often does not have enough technical knowledge to evaluate the advantages and disadvantages inherent to the submission of contractual disputes to an arbitral tribunal, while the commercial experienced party will have detailed information in that matter. The consumer is not in a position to make an informed and careful choice at the moment of conclusion of the contract. The Courts have reaffirmed that one such consumer related arbitration would only be valid if the procedure has commenced on an initiative of the consumer[38], so there are relatively few consumers related arbitrations.

An arbitral proceeding installed in accordance with the Brazilian Arbitration Act can either be made ad hoc or through an arbitral institution. Ad hoc proceedings are not usually conducted under the directives or rules of any arbitral institution. The parties are free to adopt a set of procedural rules as they see fit. However, absent agreement in the contract or in the submission agreement, the sole arbitrator or the panel of arbitrators are free to decide the rules governing the proceedings. When constituted under the auspices of an arbitral institution, the parties agree in solving their disputes through a specialized institution, which will administer the proceedings in conformity with its own rules, previously known and accepted by the parties.

Institutional arbitration has flourished in Brazil in recent years. With some well-established arbitration institutions highly regarded internationally as the CAM-CCBC and CAM-FIESP as well as a number of other institutions such as the specialized São Paulo B3 Stock Exchange and Commodities Arbitration Center (Câmara do Mercado). The Brazilian Judiciary has accordingly become one of the most arbitration friendly jurisdictions and its decisions abound in favor of commercial arbitration. The specialized courts in the São Paulo district play a crucial role by supporting arbitration, since they handle requests for pre-arbitral emergency measures, establish arbitral tribunals, and enforce arbitral awards. Also, they tend to annul arbitral awards only in exceptional cases, following the dispute resolution mechanism chosen by the parties. In this sense, research guided by the Brazilian Arbitration Committee ("CBAr") and the Brazilian Association of Jurimetrics in 2023 pointed out that that the likelihood of annulling an arbitral award today in the main arbitral institutions in the city of São Paulo is 1.5% [39].

An important new development created by the Brazilian legislators is the Arbitral Letter[40]. Much like a Letter Rogatory in which a local Court makes a request for assistance to a foreign Court, with the Arbitral Letter the arbitrators will request the cooperation of the State Courts. Much has been said about the lack of coercitive power, but with the enactment of the NBCCP, the Arbitrators can now formally request Courts to issue compelling orders or interim measures needing Court intervention, forge witnesses to give testimonies and other acts of coercitive nature. Notwithstanding this possibility, in the arbitration practice only a few Arbitral Letters have been issued either because it was not necessary, misunderstood or ineffective. In 2021, there were 1047 ongoing arbitrations on the major Brazilian arbitral institutions, in which only 15 Arbitral Letters were issued by the arbitrators, but only 8 of them were complied and enforced by the judges. In 2022, there were 1116 ongoing arbitrations, in which 11 Arbitral Letters were issued by the arbitrators, but only 4 of them were honored and enforced by the judges[41].

Currently, one of the main problems Brazilian arbitration faces is the misuse of the violation of the arbitrator's duty of disclosure as basis for annulment. This tactic although relevant and necessary in a few cases is often used to harass arbitrators, destabilize lawyers, and obstruct or delay proceedings, supporting frivolous challenges to arbitrators within arbitral institutions and baseless

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34 In 2024, this salary must be above R$ 15.572,04 or $2.739,66 USD (approximately).

35 Muniz, Joaquim de Paiva. 2018. Arbitragem no Direito do Trabalho. *Revista de Arbitragem e Mediação* 56: 179 – 187.

36 Lemes, Selma Ferreira.2023. Arbitration in Numbers. 2021/2022 Research. Conducted in 2023. Available online: https://canalarbitragem.com.br/wp-content/uploads/2023/10/PESQUISA-2023-1010-0000.pdf (accessed on 31 July 2024).

37 Andrighi, Fátima Nancy. 2006.Arbitragem nas relações de consumo: uma proposta concreta . *Revista de Arbitragem e Mediação, Brasília* 3: 13-21. https://core.ac.uk/download/pdf/79060156.pdf .

38 Paraná State Court of Justice, 17th Civil Chamber. Interlocutory appeal ("AI") n.14398939 PR 1439893-9, rel. Des. Rui Portugal Bacellar Filho, j. 17.02.2016.

39 Brazilian Association of Jurimetrics. Arbitration-Related Cases: A survey in the TJSP's judgment database, 2023. Available online: https://cbar.org.br/site/wp-content/uploads/2023/11/relatorio-observatorio-da-arbitragem-cbar-abj.pdf (accessed on 31 July 2024).

40 Brazilian Arbitration Act, Art. 22-C - An arbitrator or the arbitral tribunal ma; issue an arbitration letter so that the judicial court offers assistance or imposes compliance, in the area of their territorial jurisdiction, of an act requested by the arbitrator Sole paragraph. In compliance with the arbitration letter, the respective court proceedings will be under seal, as long as the confidentiality set forth in the arbitration verified; BNCCP, Arts. 260 and subsequent.

41 Lemes, Selma Ferreira. 2023. Arbitration in Numbers. 2021/2022 Research. Conducted in 2023. Available online: https://canalarbitragem.com.br/wp-content/uploads/2023/10/PESQUISA-2023-1010-0000.pdf (accessed on 31 July 2024).

suits to annul arbitral awards founded on alleged undisclosed impediments. Under Article 14 of the Brazilian Arbitration Act, the arbitrator is required to disclose facts and circumstances that generates "justifiable doubts" about its independence and impartiality – the same parameter adopted in the UNCITRAL Model Law[42]. Nevertheless, the local implementation of unsettled parameters and diverse interpretations of the concept of justified doubt has resulted in increasingly inconsistent jurisprudence, causing enormous legal uncertainty. Even worse than this is the attempt by the Legislative to opportunistically regulate the duty of disclosure in an unthoughtful manner, without technical basis and without public discussions or debates, as is the case with Bill No. 3.293 of 2021 ("Anti-Arbitration Bill"). This bill intends, among other controversial points, to limit the number of arbitrations in which an arbitrator can serve (to 10 proceedings), prohibit leaders of arbitral institutions from serving as arbitrators, and, most radically, change the standard of the arbitrator's duty of disclosure from "justified doubt" to "minimal doubt."

Another discussion brought by critics of arbitration is the ongoing Constitutional Claim of Noncompliance with a Fundamental Precept ("ADPF") no. 1050, requesting that the Brazilian Supreme Federal Court set the criteria for the arbitrator's duty of disclosure, in order to avoid interpretations that deviate from this understanding. Nevertheless, we strongly believe that neither the Anti-Arbitration Bill nor the ADPF would serve their own objectives, as, if granted, they could create a generic and abstract solution for all cases, rather than analyzing each situation on a case-by-case basis through the scrutiny of the institution, the arbitrator, and the parties, thus undermining the stability of arbitral awards.

Despite this, everything indicates that the controversy over the duty of disclosure will be resolved through a gradual harmonization of Brazilian jurisprudence on the subject, alongside the redefinition of the criteria for the independence and impartiality of the arbitrator, considering the most recent decision of the STJ and the increasing tendency of the Brazilian Judiciary to base its decisions on the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") – which were updated in 2024 to the new arbitration reality).

In 2024, the Brazilian Supreme Court of Justice confirmed the lower court's decision on the Brandão e Valgas v. Esho case43, denying the annulment of the arbitral award. In this case, the defeated party alleged that the award shall be annulled because one of the co-arbitrators omitted that: (i) he had previously acted as an arbitrator, despite having expressly stated that he had never performed this role; (ii) he had acted as a lawyer for a company that provides services to a business with a commercial relationship with the respondent, which could indicate possible economic dependence between the arbitrator and the respondent. The Brazilian Superior Court of Justice decided that, based on the precise and well-founded analysis of the lower court, the allegations of a breach of the duty of disclosure were insufficient to demonstrate a lack of impartiality and independence in the arbitrator's judgment, and thus there were no grounds to annul the arbitral award. In its analysis, the STJ referred to the principles of the duty to disclose in the IBA Guidelines and concluded that the fact to be disclosed by the arbitrator should be evaluated from an objective standpoint, using the perspective of an impartial third party and not by the opinions of the parties in dispute. The Court also mentioned that when a breach of the duty of disclosure is alleged in an action to annul an arbitral award, it is not merely the duty of disclosure that is assessed, but rather whether the undisclosed fact affects the integrity of the already rendered arbitral award.

Therefore, this decision was very positive to the arbitral scenario in Brazil, since it applied objective and international renowned standards to decide if there was a violation of the arbitrator's duty to disclose and also contributed to redefine the criteria for the independence and impartiality of the arbitrator in Brazil. Abengoa case set the grounds to redefine the criteria for the independence and impartiality of the arbitrator in Brazil, making it clear that it must be accessed on an objective basis, but that it also depends on a case-by-case analysis, as the Brazilian Arbitration Act does not address the issue of the arbitrator's impartiality in an exhaustive (numerus clausus) manner. Furthermore, the Brandão e Valgas v. Esho case has also complemented this redefinition of the independence and impartiality by concluding, in the words of Ricardo Aprigliano, that "the annulment of an arbitration award would require the effective demonstration of the arbitrator's partiality and not only the demonstration of a fact that, in theory, could demonstrate it"[44].

5.Conclusions

Brazil's experiences with arbitration are very positive. The Judiciary as a whole is very favorable to arbitration and in line to the best international practice and guidelines about the institute. Its decisions as well as treatises, also abound in that sense. As Brazil is becoming more and more internationalized and foreign entities and investors are getting to know the institutions, it is comforting to know that arbitration, both foreign or domestic, is a viable and often used mean to solve controversies.

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Aprigliano, Ricardo. 2024. An important decision from Brazilian Courts on the duty to disclose: non-disclosure by an arbitrator is not sufficient to justify the annulment of an arbitration award. Kluwer Arbitration Blog. Available online:

[42] UNCITRAL Model Law: "Article 12. Grounds for challenge (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him".

[43] Superior Court of Justice, Special Appeal No. 10976213920218260100, rel. Min. Nancy Andrighi, j. 05.03.2024.

[44] Aprigliano, Ricardo. 2024. An important decision from Brazilian Courts on the Duty to Disclose: Non-disclosure by an Arbitrator is not Sufficient to justify the annulment of an arbitration award. Kluwer Arbitration Blog. Available online: https://arbitrationblog.kluwerarbitration.com/2024/07/29/an-important-decision-from-brazilian-courts-on-the-duty-to-disclose-non-disclosure-by-an-arbitrator-is-not-sufficient-to-justify-the-annulment-of-an-arbitration-award/ (accessed on 31 July 2024).

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